IN THE

SUPREME COURT OF THE UNITED STATES

NO. 74-1179

UNITED STATES OF AMERICA,

Petitioner,

versus

MITCHELL MILLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

NUNN, GEIGER, RAMPEY, BUICE
& HARRINGTON
D. L. Rampey, Jr.
P. O. Drawer 520
Warner Robins, Georgia 31093
Attorney for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 74-1179

UNITED STATES OF AMERICA,

Petitioner,

versus

MITCHELL MILLER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Respondent, MITCHELL MILLER, respectfully shows:

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 500 F. 2d 751 and is appended to the Government's Petition for a Writ of Certiorari. The Dissenting Opinion from the denial of rehearing en banc is also appended but is not yet reported.

STATEMENT OF JURISDICTION

Respondent does not question the jurisdiction as set forth in the petition.

STATEMENT OF THE CASE

The petition and statement of the case is substantially correct. Respondent, however, feels that it is important to note that the checks entered in evidence at his second trial which were procurred by the subpoenas duces tecum issued to the Bank of Byron and C&S Bank of Warner Robins were admitted as evidence on overt acts nos. five, seven and eight in his Indictment.
(See Indictment at Vol. I, 8-9.)

ARGUMENT

The Respondent would ask this Honorable Court to deny the Government's Petition for Writ of Certiorari and allow the reversal of his conviction to stand so that he can proceed to a new trial. As briefed by the Petitioner, no consideration is given to the interaction of the recordkeeping provisions of the Bank Secrecy Act of 1970 (12 U.S.C. 31829 b (b)) and subpoena duces tecums issued by Grand Juries for microfilm records kept under the Act or the peculiar facts and circumstances surrounding the subpoenas duces tecum used to acquire copies of the Respondent's personal checks. Rather, the Government seeks to narrow the issues to standing and superficial compliance with the rules regarding issuance of subpoenas without considering the substantial incursion into the Respondent's private financial papers by the prosecution when no Grand Jury was in session.

Initially, it should be pointed out in this case that the Georgia Law at the time of the subpoenas in question save the two banks in question a limited interest in the original checks. At most, the bank retains the right to subrogate to the maker or drawer's interest arising from wrongful payment. (See Ga. Code Ann. 109A 4-407 (1973).) The original checks were customarily returned to the depositor according to the testimony of bank personnel at the hearing. (S. Tr. 32-55.) Also, return to the depositor is necessitated by the requirement that he review original

checks for wrongful payment, alteration or discrepancies within sixty days after receipt of the statement and checks or the bank will not be liable for unauthorized payments in the instances specified in the statement. (Ga. Code Ann. 109A 4-406 (1973))

This Court stated long ago in Boyd vs. United States, 116 U.S. 616 (1886), that"a compulsory production of a man's private papers to establish a criminal charge against him . . . is within the scope of the fourth amendment to the Constitution . . ." In this case the agents of the Alcohol, Tobacco and Firearms Units acquired information from the Respondent's private financial records that could not have been obtained without a showing of probable cause before an impartial magistrate. Since 1967 search warrants for "new evidence" of crime (which is the object of the recordkeeping requirements of the Act) have been available. (Warden, Maryland Penitentiary vs. Hayden, 387 U.S. 294 (1967); 18 U.S.C. 310 3(a) (1970)). It is evident that the subpoenas were not seeking particular transactions or documentary evidence but were engaged in a general search of the Respondent's microfilmed records to ferret out evidence of possible criminal acts.

A subpoena duces tecum which is too sweeping may violate the Fourth Amendment. See generally 5 Orfield Criminal Procedure under the Federal Rules Section 41:7. Similarly, this Court has stated that "(i)t is contrary to the first principles of justice to allow a search through all of the Respondent's records, relevant or irrelevant in the hope that something will turn up." Fed. Trade Comm. vs. American Tobacco Co., 264 U.S. 298, 306 (1923). Here all the records perpetuated by the two banks including microfilmed checks for a period of almost three months were sought without specificity in an effort to ascertain possible wrongdoing. For these reasons the Respondent contends that the subpoenas duces tecum were tantamount to a search and seizure by ATF agents in violation of the Fourth Amendment.

The Respondent further contends that these subpoenas duces tecum cannot be used by the Government to give color to an

illegal search and seizure. (See Cf. Silverthorne Lumber Co. vs. U.S. 215 U.S. 385 (1919); see also, Wallace and Tiernan Company 76 F. Supp. 215, 217 (DCRI 1948). The copies of personal checks seized were kept under the compulsion of the recordkeeping requirements of the Bank Secrecy Act which is mandatory upon insured banks with civil and criminal sanction for non-compliance. This compulsion allows the Government to now contend that once the microfilm copies are made, they become property of the banks and customers are in effect divested of standing to contest acquisition of the copies from his banks by subpoena or otherwise under the Fourth Amendment because they have no proprietary interest in the microfilm copies. It is hard to see how it can be argued that these records are maintained by banks for their convenience and business purposes when the Act is compulsory and divests banks of any choice in these matters.

In this case the very need for some appearance of authority in the form of these subpoenas was required before the two banks made the records available and points to the existence of confidential relativity. The Government argues that there is no expectation of privacy in this instance, but the analogy is strong here between a bank customer presenting a personal check for the limited purpose of negotiation and return to him for his record and the user of a pay phone as in Katz vs. U.S. 389 U.S. 347 (1967), who is entitled to assume that what he says will not be broadcast to the world.

For these reasons the Respondent contends that all subpoena power and particularly the abusive circumstances here where even the Court is divested of scrutiny should not be adopted as a means of securing access to these records. In California Bankers Association vs. Schultz 416 U.S. 21 (1974), Justices filing separate opinions all expressed concern regarding access to the voluminous records created by the Act. Here access was obtained without judicial scrutiny notice to the depositor. The record in

this case demonstrates another potential abuse, i.e. advance or premature acquisition of records for future Grand Jury use apparently without ever presenting them to the investigative body or making a return in Court.

A person's bank account reflects not only his finances, but his interests, debts, politics, way of life, family and associations. It is respectfully submitted that the logic of United States vs. U. S. District Court 407 U.S. 297 (1972), where the Court said:

"The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. . . . But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." Id., at 317.

In this case only, there was no meaningful interaction of judicial authority that insures the protection of the Respondent's Fourth Amendment rights, his right to privacy or other constitutional rights secured to him and the Government's Petition should be denied.

CONCLUSION

For the reasons set forth above, the Respondent asks that the Petition for Writ of Certiorari in behalf of the Government be denied.

Respectfully submitted this 16 day of May, 1975.

D. L. Rampey, Jr.

D. L. RAMPEY, JR.
Attorney for Respondent
(By Appointment)
P. O. Drawer 520
Warner Robins, Georgia 31093

****

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Supreme Court of the United States and hereby certify that on the 16 day of May, 1975, I served a copy of the foregoing Brief in opposition to the Petition for Writ of Certiorari of the United States on the Honorable Robert H. Bork, Solicitor General, by mailing a copy thereto in a duly addressed envelope to the Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, with First Class postage prepaid.

This 16 day of May, 1975.

D. L. Rampey, Jr.

D. L. RAMPEY, JR.